



December 2, 2019

Ms. April Tabor  
Acting Secretary  
Federal Trade Commission  
Office of the Secretary  
600 Pennsylvania Avenue NW, Suite CC-5610 (Annex J)  
Washington, DC 20580

**RE: 16 CFR part 425—Negative Option Rule, Project No. P064202**

Dear Acting Secretary Tabor:

The National Consumers League (NCL) is pleased to provide the following comments on the harms deceptive negative option clauses inflict upon consumers and small businesses. In addition, our comments identify actions the Federal Trade Commission (FTC) should take to better protect consumers from unfair or deceptive negative option marketing.

Founded in 1899, NCL is the nation's pioneering consumer organization. Our non-profit mission is to advocate for social and economic justice on behalf of consumers and workers in the United States and abroad. Through NCL's Fraud.org campaign, NCL offers free fraud

counseling and educates thousands of consumers across the country on how to avoid scams including deceptive negative options.<sup>1</sup>

### **Current marketing of negative option plans causes consumer harm**

Negative option marketing, as defined by the FTC in its January 2009 staff report, is “a category of commercial transactions in which sellers interpret a customer’s failure to take affirmative action, either to reject an offer or cancel an agreement, as assent to be charged for goods or services.”<sup>2</sup> As the staff report correctly found, “[n]egative option marketing can pose serious financial risks to consumers if appropriate disclosures are not made and consumers are billed for goods or services without their consent.”

Since the FTC last examined negative options, consumer complaints surrounding their use,<sup>3</sup> and the related popularity of subscription services, has continued to grow.<sup>4</sup> Consumers increasingly are required to agree to lengthy contracts with negative option clauses in the fine print for even the most mundane forms of commerce. Contracts for music or movie streaming services, gym memberships, dating websites, newspaper subscriptions, office equipment leases or even home cleaning services often contain negative option clauses. These clauses cause a contract or membership to renew automatically if the consumer fails to notify a merchant of their desire to cancel via a method and at a date of the merchant’s

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<sup>1</sup> National Consumers League. “Free trial offer? Not so fast.” September 1, 2019. Online: [https://www.fraud.org/free\\_trial\\_alert](https://www.fraud.org/free_trial_alert)

<sup>2</sup> Federal Trade Commission. *Negative Options: A Report by the staff of the FTC’s Division of Enforcement*. Pg. i. January 2009. Online: <https://www.ftc.gov/sites/default/files/documents/reports/negative-options-federal-trade-commission-workshop-analyzing-negative-option-marketing-report-staff/p064202negativeoptionreport.pdf>

<sup>3</sup> Better Business Bureau. “Subscription traps and deceptive free trials scam millions with misleading ads and fake celebrity endorsements.” December 2019. Online: <https://www.bbb.org/globalassets/local-bbbs/council-113/media/bbb-study-free-trial-offers-and-subscription-traps.pdf>

<sup>4</sup> Columbus, Louis. “The state of the subscription economy, 2018.” *Forbes*. March 1, 2018. Online: <https://www.forbes.com/sites/louiscolumbus/2018/03/04/the-state-of-the-subscription-economy-2018/#ca6038a53efc>

choosing. Some companies demand a notification of an intent to cancel 90 days prior to the contract's renewal.<sup>5</sup> The problem can be compounded when companies offer lengthy free trials, only to slam consumers with expensive and lengthy contracts should they fail to cancel prior to the end of the trial period.

There is abundant evidence that consumers are harmed by negative option clauses. A Better Business Bureau study of FTC complaint data found that complaints about free trials doubled between 2015 and 2017.<sup>6</sup> A 2017 survey commissioned by CreditCards.com found that 35% of Americans have signed up for an automatically renewing contract without realizing it.<sup>7</sup> A 2019 survey by Bankrate.com found that 59% of consumers have signed up for a free trial that automatically rolled over into a paid subscription or contract against their will.<sup>8</sup> The average loss for a free trial reported to the Better Business Bureau was \$186 per incident.<sup>9</sup> These data points portray a troubling, and costly problem for American consumers. Sadly, even if a consumer comprehends the fine print of their contracts and remains vigilant for any cancellation deadlines, many businesses make it challenging to cancel. The 2017 CreditCards.com survey found that nearly half of all respondents (42%) have complained about the level of difficulty companies have created for the contract/service cancellation process.<sup>10</sup>

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<sup>5</sup> Young, Brian. "DC City Council should protect consumers from deceptive automatically renewing subscriptions." National Consumers League. January 2018. Online: [https://www.nclnet.org/dc\\_autorenewals](https://www.nclnet.org/dc_autorenewals)

<sup>6</sup> Better Business Bureau. "Subscription traps and deceptive free trials scam millions with misleading ads and fake celebrity endorsements." December 2019. Online: <https://www.bbb.org/globalassets/local-bbbs/council-113/media/bbb-study-free-trial-offers-and-subscription-traps.pdf>

<sup>7</sup> Porche, Brady. "Poll: Recurring charges are easy to start, hard to get out of." Creditcards.com. August 22, 2017. Online: <https://www.creditcards.com/credit-card-news/autopay-poll.php>

<sup>8</sup> Bankrate. "Despite safety concerns, 64% of U.S. debit or credit cardholders save their information online." October 24, 2019. Online: <https://www.bankrate.com/pdfs/pr/20191024-online-shopping-survey.pdf>

<sup>9</sup> Better Business Bureau. "Subscription traps and deceptive free trials scam millions with misleading ads and fake celebrity endorsements." December 2019. Online: <https://www.bbb.org/globalassets/local-bbbs/council-113/media/bbb-study-free-trial-offers-and-subscription-traps.pdf>

<sup>10</sup> Porche, Brady. "Poll: Recurring charges are easy to start, hard to get out of." Creditcards.com. August 22, 2017. Online: <https://www.creditcards.com/credit-card-news/autopay-poll.php>

The number of confused consumers who find themselves on the hook for contracts they either did not want, or were not expecting necessitates FTC action. Whether they enter into a negative option agreement over the phone, online, in person or via some other means, consumers must have the information they need to make an informed decision. Lacking this information, there is a significant danger that consumers will be tricked into agreeing to an expensive contract they do not want.

### **Unfair or deceptive negative option clauses also harm small businesses and non-profits organizations**

While negative option protections are generally framed as a consumer protection issue, a stronger FTC rule regarding negative options would also help small business owners and non-profit organizations.

NCL's own experience with negative option clauses illustrates this. Prior to the passage of the District of Columbia's comprehensive negative option law,<sup>11</sup> NCL entered into two poorly-disclosed negative option contracts which renewed annually. One renewed at a cost of \$21,641. We were responsible for this large sum merely because we failed to provide written notice of our intention to cancel the contract more than 90 days prior to the end of the contract. The person that originally arranged for this service was no longer on staff and senior management was not made aware of the contract's automatic renewal provisions. Had this incident occurred after the passage of the District's Structured Settlements and Automatic Renewal Protections Act, we would have received a renewal

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<sup>11</sup> D.C. Law 22-235. Structured Settlements and Automatic Renewal Protections Act of 2018.

Online: <https://code.dccouncil.us/dc/council/laws/22-235.html>

disclosure/notification prior to the automatic renewal of our lengthy contract. With such notification, we could have avoided this charge, negotiated a better price, or reworked the contract to ensure that the service fit our organization's needs. Instead, NCL was forced to spend months negotiating an early, and costly, end to the contract.

Small business owners, non-profit organizations and aspiring entrepreneurs often find themselves entering negative option contracts to rent furniture, license business software and for other business needs. After the passage of the District's law, one small business owner applauded the law by stating:

*"As a small business owner, I often need to sign contracts with vendors. Knowing that outside vendors must now be upfront with the terms of their contract and that they cannot hide behind fine print to trick me into an automatically renewing contract grants me peace of mind and allows to focus on my clients, instead of fine print contract clauses."<sup>12</sup>*

Small business owners, like consumers, have better uses for their time than double-checking negative option contract timelines. Small business owners and non-profits shouldn't have to worry about being tricked into a contract they don't want, especially when surprise bills can make the difference between turning a profit and being forced to close their doors.

### **The Commission should take action to protect consumers and small business owners**

As evidenced by the statistics outlined in previous sections, considerable avenues for consumer harm exist when consumers are subject to negative option contract clauses. Even

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<sup>12</sup> This quote was sent to the Chairman of the Council of the District of Columbia and was shared with NCL by its author, a small business owner that resides in the District of Columbia.

with transactions covered by existing FTC negative option protections such as the Restore Online Shoppers Confidence Act (ROSCA), many companies continue to harm consumers. Some companies hide behind complex cancellation procedures to prevent consumers from canceling or managing their subscriptions while others surprise consumers with price increases or contract renewals.

To address this, the Commission should take action to protect consumers and entrepreneurs from deceptive negative options regardless of where and how the transaction takes place. Specifically, businesses should be required to clearly and conspicuously disclose their renewal terms prior to the entry of payment information. The definition of “clear and conspicuous” in both California’s<sup>13</sup> and the District of Columbia’s automatic renewal statutes could be used by the Commission as a starting point for defining “clear and conspicuous” disclosure in any update to the Negative Option Rule.

As part of this disclosure, businesses should be required to be upfront with the cost and timeline of when the consumer’s contract or trial will renew. This conspicuous disclosure should include information about how consumers can manage their contract, any rights the consumer has if the service is unsatisfactory and obligations the consumer is required to follow such as minimum purchase requirements.

Any FTC disclosure requirement should also ensure that consumers receive notifications prior to a negative option’s renewal, or a free/low fee trial’s rollover into a contract. These notifications should be provided in addition to the disclosure requirements outlined above and should be sent out near the end of the contract term, but prior to the cancellation deadline so that a consumer is afforded the opportunity to consider the contract or

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<sup>13</sup> California Code. Article 9. Automatic Purchase Renewals [17600-18001]. Online: [https://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?lawCode=BPC&sectionNum=17602.&article=9.&highlight=true&keyword=AUTOMATIC%20RENEWAL](https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=BPC&sectionNum=17602.&article=9.&highlight=true&keyword=AUTOMATIC%20RENEWAL)

service's merits and respond accordingly. The notifications should include pertinent information such as:

- The deadline to cancel;
- The renewal date/length of contract;
- How to cancel/amend the agreement;
- The cost the service or contract will renew at, and how the cost is different from the last contract; and
- Contact information for the business offering the negative option plan.

The protections recommended above should apply whether a consumer or small business owner enters into an agreement online, over the phone, via mail, via text or in person.

The notification should be sent both electronically and, for contracts with durations of 6 months or more, by postal mail. For electronic notifications, the notification should include links that consumers can use to cancel or manage their contracts. For notifications provided via postal mail, the notification should include a phone number or a prepaid postcard consumers can mail in to cancel or amend their contract.

In the event that the notification is being sent to a consumer who is participating in a free/low fee trial or where the business is increasing the price of the service for an established customer, the business should be required to obtain a consumer's affirmative express consent prior to automatically rolling the contract into a paid or higher fee subscription service.

## **Conclusion**

Properly regulated negative option clauses can provide business with more predictable revenue and allow consumers to avoid service interruptions. However, as more companies incorporate the use of negative option clauses in their contracts, consumers need

meaningful notifications and should be required to provide affirmative consent prior to major price increases. Businesses must compete over quality and service, not over who can create the most painful cancellation procedure or earn the most revenue by slamming consumers with price increases coupled with lengthy contracts.

Several states have enacted, or are considering protections, similar to the ones outlined above. The FTC should create strong negative option protections that can serve as a baseline for consumer protection nationally. Doing so will provide peace of mind to consumers and entrepreneurs while encouraging competition over price and service quality, not fine print contract clauses.

Sincerely,

A handwritten signature in black ink, reading "Brian Young", enclosed in a thin black rectangular border.

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